United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'
Date: September 30, 1997

Case No: **95 INA 641**

In the Matter of:

ANITA CATALANO,
Employer,

On Behalf of:

URSZULA KOCHANOWSKA,
Alien

Appearance: P. W. Janaszek, New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Urszula Kochanowska (Alien) by Anita Catalano (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On June 20, 1994, the Employer applied for labor certification to permit her to employ the Alien on a permanent basis as a "Cook Italian Live-Out" to perform the following duties in her household:

> Plans menus and cooks Italian style dishes, dinners, desserts according to the recipes of Italian cuisine. Cooks layered fresh pasta with chicken, mushrooms and cheese, Raviolacci Stuffed with Spring Herbs and Cheese, Garden - Style Whole Wheat Pappardelle. Portions and garnishes the food. Purchases food supplies and accounts for the expenses incurred.

The work week was forty hours from 9:00 AM to 6:00 PM at the rate of $12.48 per hour with no overtime. The position was later classified as "Cook (Household)(Live-Out), under DOT Code No. 305.281-010. The application (ETA 750A) indicated as education requirements the completion of elementary and high school studies and further required that applicants have two years of experience in the Job Offered. The Alien met both the educational and experience qualifications as she was a high school graduate and had worked from May 1992 to June of 1994 as a "Cook, Italian Live-Out" in a residence in Brooklyn, N. Y. AF 02-05.[2]

In an addendum to the application, the Employer stated that, "I require a special diet because I am treated for high blood pressure. I require a special diet with low salt, low sodium, low fat and low cholesterol contents. AF 01. Although the job was advertised, no response was received. AF 19. The State

[2]The duties performed in this position were virtually identical to those listed in the Employer's portion of this application. The employment continued at the time this application was filed.

employment office commented that, "This does not logically appear to be a 'full-time' job offer solely for cook (household)?" AF 23.

Notice of Findings. On April 14, 1995, a Notice of Findings (NOF) by the CO advised that certification would be denied unless the Employer corrected the defects noted. The CO said Employer's application failed to establish that the position at issue was permanent full time employment in this household within the meaning of the Act and regulations after considering the application.[3] The CO required that this finding be rebutted with evidence that the job constitutes full-time employment as defined in the Act and regulations and that it was customarily required by the Employer. The CO then listed the items of evidence that were required for the Employer to prove that the job offered is a full time position. The data required was stated in the form of several requests for specific facts and responses to explicit questions, all of which were designed to draw out collateral information that addressed this issue. The CO included inter alia instructions that the Employer produce evidence that he customarily employed a full time household cook in the past. AF 24-27.

Rebuttal. On May 8, 1995 the Employer filed a rebuttal in which she described her need for the services of a full time live-out cook to prepare meals according to the principles of traditional Italian cuisine. The Employer then described her family, which consists of herself, her husband, and their son, and their daughter and small child who frequently visit and eat at least three dinner meals per week with the Employer.

After describing her medical and family need for this position, the Employer furnished a detailed list to enumerate the functions that the Alien would perform in this position through the day and week to show that this would be a forty hour a week job. AF 28-35.

Final Determination. On May 24, 1995, the CO denied the Employer's request for certification on grounds that her rebuttal failed to demonstrate that the position was full time employment in the Employer's household.[4] Based on the size of the family and the duties enumerated by the Employer, the CO said it did not

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[3]The CO cited 20 CFR § 656.50, but there is no such regulation. It is assumed that the CO meant to refer to the definitions for this part at 20 CFR § 656.3, which contain the following: "Employment means permanent full time work by an employee for an employer other than oneself. ..."

[4]The CO again cited 20 CFR § 656.50, which was noted supra as incorrect.

appear that a full time job devoted strictly to cooking existed in this household. Certification was then denied. AF 36.

Employer's appeal. In appealing from the CO's denial of certification Employer remonstrated that the conclusion stated in the CO's FD was based on criteria that were inconsistent with the regulations, strongly criticizing the CO's gratuitous assertion that, "The job opportunity of 'Cook' was created solely for the purpose of qualifying the Alien for a visa as a skilled worker, the only household occupation which falls into the skilled worker category." AF 36, 50-51.

DISCUSSION

The primary issue on which the CO appears to have decided this application did not include whether or not the Employer's responses to the NOF establish the business necessity of this position, as the CO focused entirely on whether or not a full time position was proven. Consequently, the issue here is whether or not the CO's conclusion that full time employment is not being offered is a reasonable inference from the evidence of record. We think not. The Employer's application for alien employment certification definitively indicated the conditions of employment. 28 U.S.C. § 1746; and see 20 CFR § 656.20(c)(9). The conditions of employment state that forty hours of work are being offered each week at an hourly rate of $12.48, the adequacy of which is unchallenged by the CO. There is no evidence to the contrary in the Appellate File, and the CO refused to accept Employer's estimate of the time the cook would take to perform the proposed job duties beause it is the CO's opinion that time the Employer assumed the work would require was unrealistic and contradictory. The CO concluded that even if the Employer's version of the amount of the time that would be required for each function was accepted, the total would not be equal to an eight hour day. It follows that this dispute comes down to Employer's asserting that preparation of a particular meal takes a certain amount of time, while the CO disagrees and says that it will take less time to prepare the meal in question. In the absence of supporting evidence the CO's conclusion that the duties described would not constitute forty hours of work is speculative at best. Consequently, we conclude that the evidence of record supports the finding that the Employer offered full time employment.

On the other hand, the NOF did raise an unresolved issue as to whether or not the position description requirement of two years of specialized cooking experience in the duties of an Italian cook. The effect of this job requirement is to eliminate a U. S. applicant who has two years of cooking experience within the meaning of the DOT position description, but no experience in Italian cooking. As the CO appears to have confused Employer's proof that this position offers full time employment for a forty

hour week with the issue of the business necessity of a job requirement that was unduly restrictive, the Final Determination cannot be construed as having determined this issue after weighing the evidence in the record as a whole. For this reason, this matter will be remanded to the CO with directions to consider whether Employer's requirement of two years in cooking kosher foods is unduly restrictive for the reasons discussed above. 20 CFR § 656.21(b)(2)(i)(B). The Employer will be required to prove that the hiring of a Cook (Household)(Live-Out), specializing in Italian cooking under DOT No. 305.281-010 arises from business necessity.

As the CO did not consider whether Employer's requirement of two years in cooking Italian food is unduly restrictive under 20 CFR § 656.21(b)(2)(i)(B), the following order will enter.

ORDER

The Certifying Officer's decision denying certification under the Act and regulations is hereby set aside and this file is remanded for reconsideration for the reasons hereinabove set forth.[5]

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

[5]The CO is reminded that the observations in the NOF and Final Determination should not invite doubt as to the fairness of the CO in deciding this matter. **Yedico International, Inc.**, 87 INA 740 (Sept. 20, 1988)(en banc).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO: 95-INA-641

ANITA CATALANO,
Employer,
URSZULA KOCHANOWSKA,
Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

This has been redrafted to meet your comments on my redraft and is again submitted for the panel's consideration. Please append your dissent or concurrence to the BALCA Vote Sheet and return to me.

Thank you,

Judge Neusner

Date: September 8, 1997